INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Argument	8
Conclusion	12
Appendix	13

CITATIONS

Cases:	
Bartlett v. *United States*, 166 F. 2d 920	9, 10, 11
Dumbra v. *United States*, 268 U. S. 435	11
Fiswick v. *United States*, 329 U. S. 211	9
Glasser v. *United States*, 315 U. S. 60	9, 10, 11
Krulewitch v. *United States*, 336 U. S. 440	9, 10
Minner v. *United States*, 57 F. 2d 506	9
Pinkerton v. *United States*, 328 U. S. 640	9
Scardina v. *United States*, 80 F. 2d 699	11
Thomas v. *United States*, 57 F. 2d 1039	9
United States v. *von Clemm*, 136 F. 2d 968, certiorari denied, 320 U. S. 769	9
Wilder v. *United States*, 100 F. 2d 177	10
Statutes:	
Internal Revenue Code, Title 26, U. S. C.:	
Section 2831	2, 13
2857	2, 13
2860	2, 14
3253	2, 15
Section 37 of the Criminal Code (18 U. S. C. 1946 ed. 88)	2, 15

857712—49——1

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 290

FRED PAYNE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 318

EDDIE J. BRIGGS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 827–834) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered July 26, 1949 (R. 835). In No. 318, a

petition for rehearing was denied August 26, 1949, and the petition for a writ of certiorari was filed September 8, 1949. In No. 290, the petition for a writ of certiorari was filed August 25, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. In No. 318, whether declarations of alleged co-conspirators made in petitioner's absence were properly admitted in evidence against petitioner.

2. In No. 290, whether the trial court erred in admitting over petitioner's objection evidence procured by a government agent under a search warrant issued on the basis of information secured by the agent in making a business call at petitioner's place of business under an assumed name.

STATUTES INVOLVED

Sections 2831, 2857, 2860 and 3253 of the Internal Revenue Code, Title 26, U. S. C., and section 37 of the Criminal Code (18 U. S. C., 1946 ed., 88) are set forth in the Appendix, *infra*, pp. 13–16.

STATEMENT

Petitioners and others were indicted on November 17, 1948, in the District Court for the Eastern District of Oklahoma in one count charging a conspiracy from on or about November 15, 1946, to September 1, 1948, to violate sections

2831, 2857, 2860 and 3253 of the Internal Revenue Code, in violation of section 37 of the Criminal Code (R. 1–6). In addition, petitioner Payne, with other co-defendants not including petitioner Briggs, was charged with four substantive offenses in violation of Sections 2831, 2857, and 3253 of the Internal Revenue Code (R. 6–8). Following a trial by jury, petitioners were convicted on the counts on which they were indicted (R. 35–36, 49–51). On appeal, the convictions were affirmed (R. 835).

Since petitioners do not question the sufficiency of the evidence to support the verdict, it will suffice to summarize the evidence adduced by the Government very briefly as follows:

After Briggs became sheriff of Muskogee County, Oklahoma, a dry state, Payne established an illegal wholesale liquor enterprise adjacent to but outside the city limits of Muskogee, Oklahoma, where he procured and kept a supply of distilled spirits for sale to the retail liquor dealers of Muskogee County (R. 277, 306–311, 318–320, 324–327, 365–389, 442–443, 446–449, 514–519, 773–775, 816–821). Briggs used his power as sheriff to compel retail bootleggers in Muskogee County to purchase their liquor from Payne's establishment by raiding, harassing and prosecuting all who failed to purchase from Payne and providing protection to those who did, and also by providing protection to Payne and those who hauled liquor for him (R. 240, 278, 288–289, 295, 304, 341–352,

404–418, 443–447, 461, 465, 486, 490, 514–516, 520, 525–526, 528–530). For such protection and co-operation, Payne paid Briggs $5.00 per case of whiskey sold at his establishment (R. 259, 384–385, 404–405, 446, 462–463, 485, 514–516).

1. The evidence presented against the petitioners consisted of undisputed records, books and testimony, other than the declarations in question, showing that Payne operated a large wholesale liquor business openly and unmolested by county law enforcement officers, that those who purchased from him were free from raids and prosecution and that the purchase prices of Payne's whiskey were approximately $5.00 per case more than the prices charged by other wholesalers (R. 277, 306–311, 318–320, 324–327, 365–389, 442, 447–449, 462–463, 514–516, 773–775, 816–821). In addition, Briggs' declarations to witnesses, admitted in evidence, tended to establish that after he was elected sheriff, he was interested in making a connection with a wholesale liquor dealer who would "pay-off" to him, that he was instrumental in raiding retailers who did not purchase from Payne, and that when the newspapers commented on and publicized the illegal liquor sales in the county, he said "the newspaper is putting the heat on us all" (R. 401–405, 486, 490, 525–526). The court also admitted testimony as to numerous declarations made by Briggs' co-defendants out of his presence and to

which he was not a party. Such statements tended to establish that Briggs received from Payne $5.00 for each case of liquor sold by Payne, and that the retailers who purchased from Payne were protected by Briggs and those who did not were forced out of business by continual raids and prosecutions.[1] In each instance, the court admitted such testimony over Briggs' objection, but at the same time admonished the jury that initially it was admissible only against the defendant in whose presence the statement was made. (R. 257–259, 295, 382–384, 446, 484–485.) The court also stated that it would advise the jury later concerning the competency of such testimony against the other defendants (R. 258–259, 383).

The final instructions of the court in respect of this testimony were as follows (R. 755–757):

> You will recall, gentlemen, that in addition to the other evidence introduced by the government, numerous witnesses have testified to conversations had with some of the defendants. In each instance the conversations testified to were had with only one of the defendants, none of the others being present. Specifically the government has introduced witnesses who related conversations had with the defendant Fred Payne; with the defendant, Eddie Briggs; with the

[1] The witnesses who testified as to Briggs' co-defendants' statements were liquor dealers and the statements concerned protection from raids if they purchased liquor from Payne.

defendant Harley Greenwood; and with the defendant Gene Andrews. Each of the defendants has denied the conversations testified to by the government witnesses. The general rule is that the existence of a conspiracy cannot be established against an alleged co-conspirator by evidence of acts or declarations of his co-conspirator done or made in his absence. That means that Gene Andrews, for example, could not be connected with the conspiracy solely upon the statement of another co-defendant made in his absence; however, once a conspiracy has been established by independent evidence, the acts and declarations of one conspirator are properly admitted in evidence and are binding upon his co-conspirator. In this connection you are further instructed that the declarations of each co-conspirator are properly admitted against him, and where one of the alleged co-conspirators makes declarations and statements tending to connect him with the conspiracy, you may properly consider those statements along with all the evidence in determining whether or not a conspiracy has been established. In other words, when the independent evidence, together with the acts and declarations of one conspirator, establish the conspiracy, and the independent evidence together with the acts and declarations of the other conspirator, establish the conspiracy, or tend to establish conspiracy, the declarations of each co-conspirator, made during the pendency

of the conspiracy and in furtherance of its object, are admissible against both.

Now, gentlemen, that is a matter that came up continually during the trial of the case and I am going to talk to you in ordinary language in an effort to explain what I mean by the foregoing instruction. For example, certain witnesses testified to conversations with one defendant which would tend to show that there was a conspiracy and that he was connected with it. That is proper for you to consider. Other witnesses testified to conversations with a different defendant alleged to be a co-conspirator which statements of the other defendant would, if true, tend to show he was involved in a conspiracy. And so all around. Now then, while you may not prove conspiracy by such statements alone, when such statements were made by two or more defendants you may consider such statements, along with all the other evidence, to determine whether or not there was an actual conspiracy. I don't know whether that helps you or not, but I believe it will.

2. Prior to the trial, Payne filed a motion to suppress certain evidence consisting of his books, calculating machine tapes, papers and whiskey which had been seized by federal internal revenue officers in a search made on August 4, 1948, pursuant to a search warrant (R. 12–14). The motion was denied and the evidence was ad-

mitted at the trial (R. 128, 368).[2] The circumstances of the search were as follows:

Agent Arthur R. Franklin of the Alcohol Tax Unit, Bureau of Internal Revenue, under the name of Johnnie Kirk, went to Payne's place of business with a whiskey dealer, Leonard Conley, on June 29, 1948, and again on July 26, 1948 (R. 95, 386–387, 389). On each occasion, as Franklin drove up to Payne's place of business, Guy Payne, petitioner's cousin and employee and also a co-defendant at the trial, came up to Franklin's car and asked what they wanted (R. 386–389). Each time Franklin asked for and purchased from Guy Payne whiskey in an amount in excess of five wine-gallons (R. 386–389). Thereafter, Franklin appeared before the United States Commissioner at Muskogee and swore out an affidavit and application for the issuance of a search warrant upon the basis of the purchases made by him on June 29, 1948, and July 26, 1948 (R. 102, 129–131). A search warrant was issued and executed on August 4, 1948, and during the search the evidence in question was seized (R. 99–101, 133–139).

ARGUMENT

1. The well established rule that declarations of a conspirator are admissible against his co-

[2] This evidence, together with invoices secured from other witnesses, tended to establish that during the period of the conspiracy, Payne had purchased and received a total of 7,624 cases of liquor valued at $319,110 (R. 816–821).

conspirators although not made in their presence, provided they were made in furtherance of the objects of the conspiracy,[3] was, notwithstanding petitioner Briggs' contention to the contrary (Pet. 27–30), meticulously followed by the trial court. In each instance when testimony as to a declaration of one of the defendants made in Briggs' absence was admitted, the court emphasized to the jury that such testimony was admissible at that time only against the defendant who made the statement or in whose presence it was made. The court further pointed out that such evidence might later be considered against the other co-defendants, but that it would subsequently advise the jury as to the competency of the evidence against them. At the conclusion of the trial, the court carefully and in detail instructed the jury that "the existence of a conspiracy cannot be established against an alleged co-conspirator by evidence of acts or declarations of his co-conspirator done or made in his absence," that independent evidence together with evidence as to acts or declarations of individual conspirators may prove the existence of a con-

[3] *Krulewitch* v. *United States*, 336 U. S. 440, 443; *Fiswick* v. *United States*, 329 U. S. 211, 217; *Pinkerton* v. *United States*, 328 U. S. 640, 647; *Glasser* v. *United States*, 315 U. S. 60, 74; *Bartlett* v. *United States*, 166 F. 2d 920 (C. A. 10); *United States* v. *von Clemm*, 136 F. 2d 968 (C. A. 2), certiorari denied, 320 U. S. 769; *Thomas* v. *United States*, 57 F. 2d 1039 (C. A. 10); *Minner* v. *United States*, 57 F. 2d 506, 511 (C. A. 10).

spiracy, and that when a conspiracy is so proved, the acts and declarations of each conspirator are admissible against all if done or made "during the pendency of the conspiracy and in furtherance of its object." This was a correct statement of the law. *Glasser* v. *United States,* 315 U. S. 60, 81–82; *Bartlett* v. *United States,* 166 F. 2d 920, 925 (C. A. 10); *Wilder* v. *United States,* 100 F. 2d 177, 182 (C. A. 10).

The recent *Krulewitch* decision, *supra,* of this Court, upon which Briggs relies, does not support his position. The Court in that case recognized as "firmly established" (336 U. S. at 443) the rule so stated by the trial court. The *Krulewitch* decision simply rules inadmissible as against one conspirator declarations made by a co-conspirator after the termination of the conspiracy. Such was not the case here.

Contrary to Briggs' further contention (Pet. 30–31), there was sufficient evidence, without the declarations in question, to justify the jury's inference that petitioner was a member of the conspiracy. As we have pointed out, such evidence consisted of his own declarations and undisputed records, books and testimony showing that Payne openly, notoriously and without molestation by county law enforcement officers, conducted an illegal wholesale liquor business and that those who purchased for him and from him were also unmolested, while those dealers who did not do so were raided and prosecuted by Briggs and

his deputies. In addition, such evidence showed that the prices of liquor purchased from Payne were higher than those of other dealers.

The fact that the testimony concerning the declarations was admitted prior to the time that the existence of the conspiracy was established is immaterial. The order of the proof is discretionary with the trial court. *Glasser* v. *United States, supra,* p. 81; *Bartlett* v. *United States, supra,* p. 925. Furthermore, the statements were admitted initially only against the defendant who made them.

2. Petitioner Payne cites several decisions, including some of this Court, which he claims support his contention that the search was in violation of his rights under the Fourth and Fifth Amendments of the Constitution. The cited decisions involved either searches without warrants or searches with warrants where the information on which the warrant was issued was secured by stealth, secrecy or active misrepresentations. Obviously these decisions are inapplicable here. Payne operated a place of business and Franklin appeared on the premises as a member of the public without making any representations. Because Franklin was a government agent and did not disclose such fact to petitioner does not render the warrant and the search based thereon illegal. *Dumbra* v. *United States,* 268 U. S. 435, 440–442; *Scardina* v. *United States,* 80 F. 2d 699 (C. A. 5). Petitioner's further contention that the search

began when Franklin appeared on June 29 without a warrant is clearly without merit and needs no discussion.

CONCLUSION

The case involves only the application of settled principles and presents no questions requiring further review by this Court. We therefore respectfully submit that the petitions for writs of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
ALEXANDER M. CAMPBELL,
Assistant Attorney General.
ROBERT S. ERDAHL,
FELICIA H. DUBROVSKY,
Attorneys.

OCTOBER 1949.

APPENDIX

The pertinent sections of the Internal Revenue Code, Title 26, U. S. C., are:

SEC. 2831. Every person engaged in distilling or rectifying spirits, and every wholesale liquor dealer, shall place and keep conspicuously on the outside of the place of such business a sign, exhibiting in plain and legible letters, not less than three inches in length, painted in oil colors or gilded, and of a proper and proportionate width, the name or firm of the distiller, rectifier, or wholesale dealer, with the words: "Registered distillery," "rectifier of spirits," or "wholesale liquor dealer," as the case may be. Every person who violates the foregoing provision by negligence or refusal, or otherwise, shall pay a penalty of $500.

SEC. 2857. Every rectifier and every wholesale liquor dealer who sells, or offers for sale, distilled spirits in quantities of five wine-gallons or more to the same person at the same time shall keep daily, at his place of business covered by his special tax stamp, a record of distilled spirits received and disposed of by him, and shall render under oath correct transcripts and summaries of such records: *Provided,* That the Commissioner may in his discretion require such record to be kept at the place where the spirits are actually received and sent out. The records shall be kept and the transcripts shall be rendered in such form, and under such rules and regulations

as the Commissioner, with the approval of the Secretary, may prescribe.

The records required to be kept under the provisions of this section and regulations issued pursuant thereto, shall be preserved for a period of four years, and during such period shall be available during business hours for inspection and the taking of abstracts therefrom by the Commissioner or any internal revenue officer.

Every rectifier and wholesale liquor dealer who refuses or neglects to keep such records in the form prescribed by the Commissioner, with the approval of the Secretary, or to make entries therein, or cancels, alters, or obliterates any entry therein (except for the purpose of correcting errors) or destroys any part of such records, or any entry therein, or makes any false entry therein, or hinders or obstructs any internal revenue officer from inspecting such records or taking any abstracts therefrom, or neglects or refuses to preserve or produce such records as required by this chapter or by regulations issued pursuant thereto, shall pay a penalty of $100 and, on conviction, shall be fined not less than $100 nor more than $5,000, and be imprisoned not less than three months nor more than three years.

* * * * *

SEC. 2860. It shall not be lawful for any rectifier of distilled spirits, or wholesale or retail liquor dealer, to purchase or receive any distilled spirits in quantities greater than twenty gallons from any person other than an authorized rectifier of distilled spirits, distiller, or wholesale liquor dealer. Every person who violates this section shall forfeit and pay $1,000:

Provided, That this provision shall not be held to apply to judicial sales, or to sales at public auction made by an auctioneer, or to sales upon which no special tax accrues as enumerated and provided for in section 3251. This section shall not be held to prohibit a rectifier or liquor dealer from purchasing, in quantities greater than twenty wine-gallons, the distilled spirits sold in one parcel as provided in section 3251 (c).

SEC. 3253. Any person who shall carry on the business of a brewer, rectifier, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquors, retail dealer in malt liquors, or manufacturer of stills, and willfully fails to pay the special tax as required by law, shall, for every such offense, be fined not less than $100 nor more than $5,000 and be imprisoned for not less than thirty days nor more than two years. And all distilled spirits or wines, and all stills or other apparatus, fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or rectifying establishment, or in any building, room, yard, or enclosure connected therewith and used with or constituting a part of the premises, shall be forfeited to the United States.

Section 37 of the Criminal Code (18 U. S. C., 1946 ed., 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or

more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

U. S. GOVERNMENT PRINTING OFFICE: 1949